STATE OF MICHIGAN

COURT OF APPEALS

KRITZMAN DEVELOPMENT,

Plaintiff-Counterdefendant-Appellant,

v

WALDEN PROPERTIES, LLC,

Defendant-Counterplaintiff-Appellee,

and

LAWRENCE HOLT and LINDA CHASE,

Defendants-Appellees.

UNPUBLISHED
May 6, 2008

No. 274147
Alpena Circuit Court
LC No. 05-000610-CH

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Plaintiff Kritzman Development (Kritzman) appeals by leave granted the trial court's order denying its motion for summary disposition and dismissing Kritzman's complaint, which sought injunctive relief. We reverse and remand for entry of judgment in favor of Kritzman on its complaint.

I. Basic Facts and Procedural History

Defendant Walden Properties, LLC (Walden), was the fee simple owner of a large parcel of land in Alpena County that it wished to develop as a single-family residential subdivision.[1]

[1] Apparently, Walden sold the property to defendants Holt and Chase after leave was granted by this Court. Pursuant to a subsequent order of this Court, Holt and Chase were joined with Walden as defendants-appellees in this appeal. *Kritzman Dev v Walden Properties, LLC*, unpublished order of the Court of Appeals, entered October 19, 2007 (Docket No. 274147). Holt and Chase later submitted a joint appellate brief.

Kritzman sued Walden to enjoin it from developing the land, alleging that the development would interfere with Kritzman's rights to use the land for hunting and other recreational activity pursuant to an easement coupled with a profit á prendre originally created in 1929.

The property at issue was at one time owned by Wilma J. Henry, a predecessor in the easement-profit interest now claimed by Kritzman. Henry conveyed fee ownership of the property to defendants' predecessor-in-interest, the Alpena Power Company, in 1929. Alpena Power obtained title to the land by way of a warranty deed recorded October 29, 1929. On the same date that the deed was recorded, Alpena Power and Henry recorded an indenture dated October 25, 1929, which granted Henry certain rights relative to the property. The pertinent language contained in that document, which is at the heart of this dispute, provides:

> [Alpena Power Company] gives, grants and Forever conveys unto second party [Henry] her heirs, representatives, licensees, and assigns, *the exclusive easement and right to enter upon the premises hereinafter described for the purpose of hunting deer and other game animals and birds and for all recreation and resort purposes*, except such as may interfere with first party's operation and maintenance of its water uses in connection with a reservoir or power dam, the erection of which . . . is now contemplated . . . . [Emphasis added.][2]

Kritzman alleged that after Walden acquired the land in 2005, Walden "removed timber from the land surface and excavated pathways, roadways, and home sites with the obvious and declared purpose of preparing the property for, and developing into, a residential, recreational, and resort development, all in violation and infringement of [Kritzman's] exclusive easement and profit." Kritzman sued to enjoin development of the property. Walden filed a counterclaim against Kritzman, alleging that Kritzman had exceeded its recreational use of the land by mining gravel from the property.

Relying on MCR 2.116(C)(8),(9), and (10), Kritzman filed a motion for summary disposition relative to its complaint for injunctive relief and to Walden's counterclaim. Kritzman argued that the 1929 indenture gave it an easement coupled with a profit á prendre and that the proposed residential development of the property would interfere and be inconsistent with the rights created by the indenture. Walden, relying on MCR 2.116(C)(8),(9),(10), and (I)(2), filed its own motion for summary disposition with respect to its counterclaim and Kritzman's complaint. Walden contended that the language of the indenture merely gave Kritzman a profit á prendre to hunt and fish on the land and that the rights conveyed in the profit did not bar Walden from developing the land in good faith.

In a written opinion and order, the trial court ruled that the granting language was unambiguous, that the language contained no express prohibition on the grantor's future

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[2] The record contains numerous documents reflecting conveyances of the pertinent interests over the years, establishing chains of title. It is unnecessary to review these documents and transactions because the parties do not dispute that the property is subject to the language of the 1929 indenture and that Kritzman can seek its enforcement.

development of the property, and that the right to hunt under the grant constituted a profit á prendre. The trial court also stated:

> The Court further believes that the "recreational and resort purposes" language contained within the grant does not create an independent easement for those rights based on well-established rules of construction. Where, as here, the hunting and recreational rights are intertwined within a seemingly unified conveyance labeled "exclusive easement," the plain language demands interpretation of the grant as a whole. Rather than fragmenting several words from the same sentence (which are not even separated by a comma) into separate types of interests in land, the Court finds that the only possible interpretation, based on both logic and grammar, is to read the Grant as one conveyance.
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> This Court accordingly holds that recreational and resort purposes, mentioned in a grant of hunting and fowling privileges, are incidental to the hunting grant and do not create a separate right or somehow alter the landowner's rights under the hunting profit.
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> The Court therefore finds, as a matter of law, that the Grant does not prohibit the Defendant from developing the Property in good faith.

The trial court denied Kritzman's motion for summary disposition, summarily dismissed Kritzman's complaint for injunctive relief, and allowed Walden's counterclaim to proceed because questions of fact existed. Kritzman appeals by leave granted.

II. Analysis

A. Standard of Review

Questions of law generally and a trial court's ruling on a motion for summary disposition are reviewed de novo on appeal. *Mt Pleasant v State Tax Comm*, 477 Mich 50, 53; 729 NW2d 833 (2007); *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). In general, a trial court's decision to grant or deny injunctive relief is reviewed for an abuse of discretion. *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001).

B. Governing Principles Regarding Interpretation of Real Estate Documents

In *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005), our Supreme Court, quoting *Purlo Corp v 3925 Woodward Avenue, Inc*, 341 Mich 483, 487-488; 67 NW2d 684 (1954), provided the following guidelines for purposes of interpreting language in a document of conveyance:

> "(1) In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if

> possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable." [Alterations in original.]

We shall keep these principles in mind in analyzing the appellate issues presented by the parties.

C. Overview of Appellate Arguments

Kritzman maintains that the grant constituted a profit á prendre coupled with an easement and that it prohibited future development of the property for purposes other than those consistent with the operation and maintenance of the grantor's water uses in connection with the reservoir and power dam. Defendants argue that the grant constituted solely a profit á prendre and not an easement and that future development of the property as contemplated is permissible.

D. Profits á Prendre and Easements

"A profit á prendre is the right to acquire, by severance or removal from another's land, something previously constituting part of the land." *Hubscher & Son, Inc v Storey*, 228 Mich App 478, 483; 578 NW2d 701 (1998); see also *VanAlstine v Swanson*, 164 Mich App 396, 405; 417 NW2d 516 (1987); *Stevens Mineral Co v Michigan*, 164 Mich App 692, 698; 418 NW2d 130 (1987); *Evans v Holloway Sand & Gravel, Inc*, 106 Mich App 70, 78; 308 NW2d 440 (1981). Examples of a profit á prendre include the right to enter upon the property of another to remove gravel, minerals, and other materials, along with the right to hunt on the premises. *St Helen Shooting Club v Mogle*, 234 Mich 60, 65-69; 207 NW 915 (1926); *VanAlstine, supra* at 405; *Evans, supra* at 78. A profit "is distinguishable from a mere license or easement because it includes the right to remove." *VanAlstine, supra* at 405. There is no right to use the property except as incident to the right of removal. *Stevens Mineral, supra* at 698. "Until the right is actually exercised and possession is taken, it is a floating, indefinite, and incorporeal right." *Id.*; see also *VanAlstine, supra* at 405.

In *St Helen, supra* at 65-66, our Supreme Court explained the nature of a profit á prendre relative to hunting rights, stating:

> The right of hunting on premises is an incorporeal right, growing out of real estate, which, by the common law, was conveyed by grant, inasmuch as livery of seisin could not be made of it. This right has been termed by law writers a grant of a "*profit à prendre*." A "*profit à prendre*" is some right growing out of the soil. It is somewhat difficult to understand how, where one shoots a duck in the air while over the water, he is taking something from the soil, but undoubtedly the application of that term was made to this right, so that it would become in law an incorporeal hereditament, and thereby pass by grant and not become a mere license.
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> But, whatever inconsistencies appear, it is settled by all the authorities worth heeding that this right may be segregated from the fee of the land and

> conveyed in gross to one who has no interest and ownership in the fee, and when so conveyed in gross it is assignable and inheritable.

Turning to the law of easements, an easement is an interest in land. *Lakeside Oakland Dev, LLC v H & J Beef Co*, 249 Mich App 517, 525; 644 NW2d 765 (2002). In *Schadewald v Brule*, 225 Mich App 26, 35-36; 570 NW2d 788 (1997), this Court enunciated some basic principles regarding easements:

> An easement is the right to use the land of another for a specified purpose. An easement does not displace the general possession of the land by its owner, but merely grants the holder of the easement qualified possession only to the extent necessary for enjoyment of the rights conferred by the easement.
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> An appurtenant easement, which is the type of easement at issue in this case, attaches to the land and is incapable of existence separate and apart from the particular land to which it is annexed. The land served or benefited by an appurtenant easement is called the dominant tenement. The land burdened by an appurtenant easement is called the servient tenement. . . .[3]
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> Once granted, an easement cannot be modified by either party unilaterally. The owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden. [Citations omitted.]

Through act or operation of law, easements can be created by express grant, by reservation or exception, and by agreement or covenant. *Meyers v Spencer*, 318 Mich 155, 164; 27 NW2d 672 (1947); *State Highway Comm v Canvasser Bros Bldg Co*, 61 Mich App 176, 181; 232 NW2d 351 (1975). The owner of a fee that is subject to an easement is entitled to make any use of the land as long as it is consistent with the easement owner's rights and does not interfere with the reasonable use of the easement. *Morrow v Boldt*, 203 Mich App 324, 329; 512 NW2d 83 (1994); *Lee v Fidelity Life & Income Mut Ins Co*, 2 Mich App 82, 86-87; 138 NW2d 545 (1965). In *Lakeside Assoc v Toski Sands*, 131 Mich App 292, 299-300; 346 NW2d 92 (1983), this Court, quoting *Harvey v Crane*, 85 Mich 316, 322-323; 48 NW 582 (1891), noted the respective rights of easement grantees and fee owners subject to an easement:

> 1. That the conveyance of a right of way gives to the grantee not only a right to an unobstructed passage at all times over defendant's land, but also such rights as are incident or necessary to the enjoyment of such right of passage.
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> 2. The owner of the way, where its limits are defined, has not only the right of a free passage over the traveled part, but also to a free passage on such portions of the way as he thinks proper or necessary.

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[3] There are also easements in gross, which are easements that benefit a particular person and not a specific piece of property. *Carmody-Lahti, supra* at 378-379 n 41.

> 3. The owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the rights of the owner of the easement.
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> 4. The rights of the owner of the easement are paramount, to the extent of the grant, to those of the owner of the soil.
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> 5. The owner of the soil is under no obligation to repair the way, as that duty belongs to the party for whose benefit it is constructed.
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> 6. What may be considered a proper and reasonable use by the owner of the fee, as distinguished from an unreasonable and improper use, as well as what may be necessary to plaintiff's beneficial use and enjoyment, are questions of fact to be determined by the trial court or jury. (Citations omitted.) [Internal quotations omitted.]

While *VanAlstine, supra* at 405, distinguished easements from profits á prendre on the basis that a profit includes the right of removal, the *Evans* panel, citing the Restatement of Property, § 450, Special Note, pp 2901-2902, spoke of the similarities between the interests, observing:

> An easement is a privilege without profit which the owner of one parcel of land may have in the lands of another. An easement in gross is not appurtenant to any estate in land but constitutes a personal interest in, or right to use, the land of another. In the present case the trial judge failed to distinguish between an easement in gross and a profit á prendre; however, such failure is immaterial because of the similar nature of these property interests. [*Evans, supra* at 78 (citations omitted).]

E. Application and Discussion

The language of the indenture indicates that Kritzman holds an "exclusive *easement* and right to enter upon the premises hereinafter described for the purpose of hunting deer and other game animals and birds *and for all* recreation and resort purposes[.]" (Emphasis added). For us to construe this language as not granting an easement, despite the express use of the term "easement" in the indenture, would be contrary to the plain language of the grant and the principles governing the interpretation of real estate documents, and thus contrary to the grantor's intent. *Carmody-Lahti, supra* at 370. Moreover, while a profit á prendre was clearly created, given the reference to hunting rights, the indenture language proceeds, by use of the conjunctive term "and,"[4] to additionally provide the grantee with rights to use the property for, not just some, but *all* recreation and resort purposes. Thus, the grantee was given a profit coupled with an easement. Furthermore, except for the limitations relative to the reservoir and

[4] "Plainly, the use of the conjunctive term 'and' reflects that *both* requirements must be met . . . ." *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 33; 732 NW2d 56 (2007) (emphasis in original).

power dam, the *entire* parcel is at the disposal of the grantee for purposes of hunting and all recreation and resort purposes. The construction of a residential subdivision on the property would clearly interfere and be inconsistent with the rights granted in the 1929 indenture.[5]

Although defendants and the trial court correctly observed that the language of the grant does not expressly prohibit a housing development, the proper question to ask is whether a housing development or the building of a subdivision would interfere and be inconsistent with the easement and profit rights granted under the indenture, and the answer is "yes."

In support of their argument that Walden was proceeding in good faith and that the land could therefore be used to construct a housing development, defendants rely on the following language from *St Helen, supra* at 67, "'Thus, if the owner of land conveys to others the right to hunt water fowl upon the waters thereof, he is not liable for depreciation in the value of such fowling rights from his acts in clearing and draining the land, provided he does so in good faith for the purpose of improving it.'" (Citation omitted.) The language in the document of conveyance in *St Helen* gave the grantee "the exclusive right of hunting game and wild fowl in and upon the lakes and marsh of and on the following described premises . . . ." *Id.* at 62 n 1. The language here is much more broad and created not only a profit á prendre, but a profit coupled with an easement. Our language is not limited to merely hunting.[6] We view the reference to "good faith" in *St Helen* as standing for, at best, the simple proposition that a fee owner can use the land in a way that improves it so long as easement or profit rights are not impinged, which is not the situation in the case at bar.

The trial court and defendants relied on *Mikesh v Peters*, 284 NW2d 215 (Iowa, 1979); however, the case is distinguishable and is, of course, not binding on this Court. In *Mikesh*, the grantee was given "recreational rights," which included, but were not limited to, the right to hunt, fish, canoe, camp, and trap on the premises. The fee owner clear-cut some timber from the land. *Id.* at 216. The Iowa Supreme Court held that recreational rights, when so equated with hunting rights, did not limit the landowner in his or her use of the land absent bad-faith destruction of the object of the right or an express covenant to the contrary. *Id.* at 219. Here, we are not speaking merely about the removal of some trees, but the construction of a housing development that would clearly run afoul of the rights granted under the indenture. Moreover, in *Mikesh*, there was evidence that the party who reserved the recreational rights envisioned the cutting of logable trees by the fee purchaser. *Id.* at 216. There is no such evidence here, and indeed the indenture indicates only that the grantor would be operating the reservoir and power dam.

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[5] Kritzman supplied an uncontradicted affidavit from an expert in forestry who averred that the housing development would destroy the value of the property for hunting and destroy or alter the surrounding habitat.

[6] We cannot help but question whether, if Kritzman was limited to a profit to hunt, the construction of a residential subdivision would nonetheless interfere and be inconsistent with hunting rights. We assume that state and local laws would preclude hunting in the vicinity of the residences. Indeed, Kritzman's expert averred that "[t]he mandated safety zone around occupied buildings completely destroys the hunting use and value of the affected property."

Reliance by the trial court and defendants on *Isherwood v Salene*, 61 Or 572; 123 P 49 (1912), is also misplaced. *Isherwood* involved a grant that gave the grantees the right to shoot and kill any and all wild ducks and water fowl on the property, and the grantees sued to enjoin the defendant fee owner from draining marshes situated on the land and cutting and burning brush and timber that bordered lakes on the property. *Id.* at 573-574. The court ruled that the fee owner could be held liable if the actions were taken in bad faith with the wrongful intent to injure the rights of the grantees. *Id.* at 578-580. Here, more than hunting rights were granted and a housing development was planned. There is clear incompatibility. We are not prepared to rule that where a fee owner actually interferes with an easement or profit, the holder of the interest is not entitled to an injunction because the fee owner may have somehow been proceeding in good faith. Walden, being aware of the language in the 1929 indenture, was not proceeding in good faith and, regardless, Michigan law dictates that the owner of a fee that is subject to an easement is entitled to make use of the land, but only if it is consistent with the easement owner's rights and does not interfere with the reasonable use of the easement. *Morrow*, *supra* at 329; *Lee, supra* at 86-87.

Finally, defendants complain that no viable economic use of the property is available if Kritzman's position is vindicated. However, there are certainly uses that would not conflict with Kritzman's rights, and Kritzman's forestry expert even averred that "[c]ompatible land uses on this property are timber production, forest recreation that does not require development of facilities, and possibly some specialty crops like fruit, berry, mushrooms and forage."[7]

III. Conclusion

The construction of a housing development would interfere and be inconsistent with the rights granted under the 1929 indenture, which constituted a profit coupled with an easement. Accordingly, Kritzman was entitled to injunctive relief, and the trial court erred in dismissing the complaint and in failing to grant summary disposition in favor of Kritzman on its complaint. Defendants are of course free to pursue the counterclaim.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Pat M. Donofrio

[7] We do note that Kritzman is wrong in suggesting that defendants are limited to uses consistent with operation of the reservoir and power dam. The indenture only provided that the grantee and assigns could not interfere with the grantor's operation of the dam and reservoir, but this does not mean that the grantor was limited to these operations. Rather, the grantor and its assigns could undertake any activity on the land unless it interfered with the easement and profit rights.